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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/994,282	11/23/2001	James Clement Martinec		8828

7590 06/03/2004  
JAMES C. MARTINEC  
15922 PILGRIM CR.  
HUNTINGTON BEACH, CA 92647

EXAMINER

THANH, QUANG D

ART UNIT	PAPER NUMBER
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3764

DATE MAILED: 06/03/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/994,282

Applicant(s)

MARTINEC, JAMES CLEMENT

Examiner

Quang D. Thanh

Art Unit

3764

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 05 May 2004.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-4 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-4 is/are rejected.
- 7) ☒ Claim(s) 1-4 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 05/05/2004 has been entered.

### ***Response to Amendment***

2. The amendment filed on 05/05/2004 is objected to under 35 U.S.C. 132 because it introduces new matter into the disclosure. 35 U.S.C. 132 states that no amendment shall introduce new matter into the disclosure of the invention. The added materials which are not supported by the original disclosure are as follows: "free standing vertical height between 12.0 to 22.0 inches" , "free standing width between 24.0 to 28.0 inches" and "free standing circumference between 12.0 to 22.0 inches" recited in claim 1 and shown in figures 1-2.

Applicant is required to cancel the new matter in the reply to this Office Action.

### ***Claim Objections***

3. The claims are objected to because claims 1 and 4, each contains more than one sentence. The examiner suggests that semi-colon ";" should be used instead of period "." between the paragraphs.
4. Claims 1-4 are objected to because of the following informalities: In claim 1, "the elongated edge circumference" lacks antecedent basis and should be -- an elongated edge circumference--. The remaining claims are objected to because they depend on an objected claim. Appropriate correction is required.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

1. Claims 1-4 are rejected under 35 U.S.C. 103(a) as being unpatentable over Keller, Jr. (4,688,556) in view of Ryan et al. (6,419,650).
2. Re claim 1, Keller discloses a body massage cylinder apparatus 10 (fig. 1-2) comprising: (a) a uni-body apparatus 11 (a single massage element 11 can be used as disclosed in col. 2, lines 3-8) constructed from a resilient rubber material (col. 1, lines 62-63) forming a cylinder shape (fig. 4-5) supported by an air chamber (inflation bladder, col. 1, lines 65-66), this massage element 11 is constructed with no separate

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moveable or removable main components (fig. 4); (b) dimensioned such that the user is at an intended height off the ground (fig. 1); (c) dimensioned such that the user is securely fitted when bi-secting an elongated edge circumference (fig. 1); (d) dimensioned such that the mass and size of the apparatus are sufficient to support the user in a proper position during use (fig. 1); and (f) an inflatable means comprising an inlet air valve 12 (fig. 4) to allow for adjusting the height and firmness by increasing or decreasing air pressure. Keller lacks ribbed and semi pointed formed surfaces in an alternating pattern that radiates outwards from the circumference. However, Ryan teaches a plurality of projections or nubs 14 arranged in a ribbed pattern that encircles the outer surface of the massage element 12 (fig. 2, col. 4, lines 29-34). Therefore, it would have been obvious to one of ordinary skill in the art at the time of invention was made to modify the device in the Keller's reference, to include the ribbed and semi pointed surfaces, as suggested by Ryan et al., so as to enhance the back massaging effect by providing acupressure stimulation (col. 2, lines 15-17).

Regarding various dimensions of vertical height, width and circumference, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device such that it would have a vertical height between 12.0 to 22.0 inches, a width between 24.0 to 28.0 inches, a circumference between 12.0 to 22.0 inches, and ribbed and semi pointed formed surfaces in an alternating pattern that radiates outwards from the circumference between .25 to .75 inches, for the purpose of accommodating various sizes of different users, since such a modification would have involved a mere change in the size of a component. A change in size is generally

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recognized as being within the level of ordinary skill in the art. In re Rose, 105 USPQ 237 (CCPA 1955).

3. Re claim 2, Keller further teaches a rubber material is preformed into a cylinder shaped uni-body element which allows a sufficient air pressure and support (col. 1, line 59 to col. 2, line 8).

4. Re claim 3, the combined Keller/Ryan teaches a rubber material is preformed into a cylinder shaped uni-body element with a shell having ribbed formations that would be extending across the entire shell and these ribbed formations are sufficiently spaced and alternate their pattern along the circumference of the apparatus.

5. Re claim 4, Keller further teaches the apparatus is constructed in a symmetrical uni-body design which yield a top surface parallel to the ground and a size giving the user optimum balance and control (fig. 1), a proper height off the ground (fig. 1), and capable to modify height and firmness of the apparatus by adjusting the air pressure via the inlet air valve 12 (col. 2, lines 24-30).

### **Conclusion**

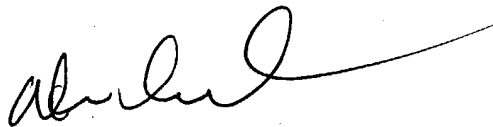
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Quang D. Thanh whose telephone number is (703) 605-4354. The examiner can normally be reached on Monday-Thursday & alternate Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Nick Lucchesi can be reached on (703) 308-2698. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306 for regular and After-Final communications.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Quang D. Thanh  
Patent Examiner  
Art Unit 3764  
May 24, 2004



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